

ESTTA Tracking number: **ESTTA1391975**

Filing date: **10/25/2024**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding no.	91281389
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Date	10/25/2024
Attachments	2024.10.25 Applicant's Trial Brief_91281389.pdf(3784879 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

HANGZHOU MENGKU TECHNOLOGY
CO., LTD

Opposer,

v.

SHANGHAI ZHENGLANG
TECHNOLOGY CO., LTD.

Applicant.

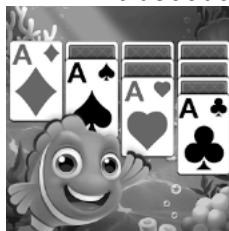
Opposition No. 91281389 (Parent)

Opposition No. 91281390

Application Ser. Nos. 90866064, 90868193

Ser. No. 90866064

Ser. No. 90868193



APPLICANT SHANGHAI ZHENGLANG TECHNOLOGY CO., LTD.'S TRIAL BRIEF

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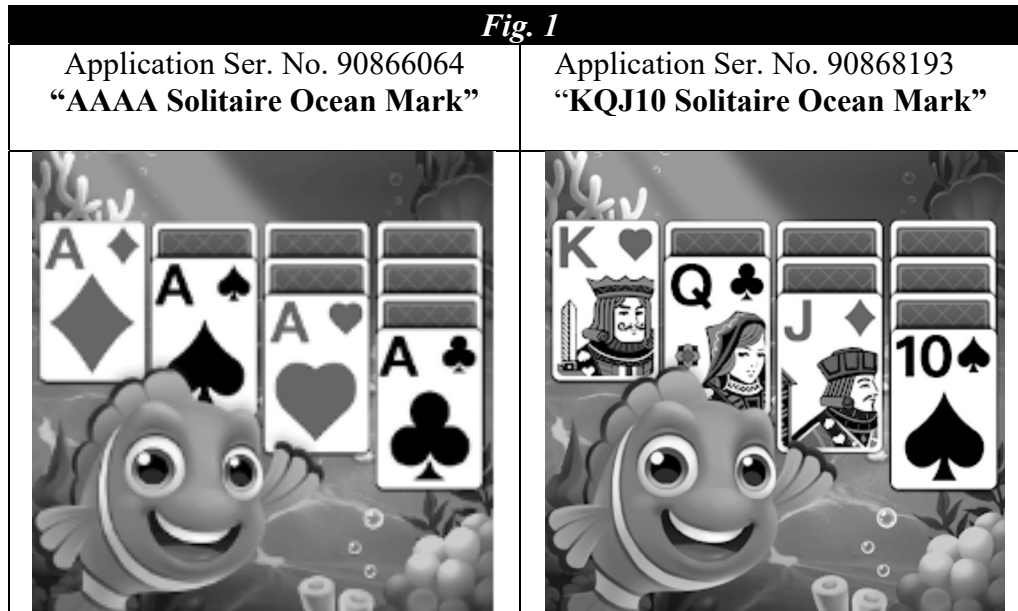
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1 J. Thomas McCarthy, <i>McCarthy on Trademark and Unfair Competition</i> (5th ed., database updated Mar. 2024), Westlaw § 11:27	17
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I. INTRODUCTION

Hangzhou Mengku Technology, Co., Ltd. (“Opposer”) filed this opposition on October 26, 2022 alleging, *inter alia*, that the following marks (“Applicant’s Marks”) are merely descriptive:¹



Opposer has not met its burden of proving mere descriptiveness by a preponderance of evidence. Nor could it, as the marks are at least suggestive of the goods for which they are used. Opposer’s opposition must be denied with prejudice.

II. ISSUE PRESENTED

The only issue remaining in this opposition is whether Opposer has proven by a preponderance of admissible evidence that Applicant’s Marks are merely descriptive of Applicant’s mobile gaming software and related goods in Class 9.

¹ Opposer’s Notice of Opposition also included a claim alleging priority and likelihood of confusion; *See* 1 TTABVUE 9–10. The Board has dismissed Opposer’s likelihood of confusion claims. *See* 18 TTABVUE 14–15.

III. DESCRIPTION OF THE RECORD

In accordance with Rule 2.128(b) of the Trademark Rules of Practice, 37 C.F.R. § 2.128(b), and the Trademark Trial and Appeal Board Manual of Procedure (“TBMP”) § 801.03 (2023), Applicant provides the following description of the record:

- File History for Applicant’s Application Ser. Nos. 90866064 and 90868193
- Opposer Hangzhou Mengku Technology, Co., Ltd.’s (“Opposer”) Notice of Opposition 1 TTABVUE
- Applicant’s Answer 4 TTABVUE
- Opposer’s Testimony Declaration of Qianan Li (“Q. Li Decl.”) and Exhibits 19 TTABVUE
 - Testimony Declaration of Qianan Li 19 TTABVUE
 - Exhibits to Opposer’s Testimony Declaration of Qianan Li 21 TTABVUE
- Opposer’s Notice of Reliance (“Opposer’s NOR”) and Exhibits 20 TTABVUE
- Applicant’s Testimony Declaration of Ruihua Ji (“R. Ji Decl.”) and Exhibits 22 to 24 TTABVUE
 - Testimony Declaration of Ruihua Ji 22 TTABVUE
 - Exhibits 1–30 to Testimony Declaration of Ruihua Ji 22 TTABVUE
 - Exhibits 31–40 to Testimony Declaration of Ruihua Ji 23 TTABVUE
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- Opposer’s Rebuttal Testimony Declaration of Qianan Li (“Q. Li Rebuttal Decl.”)..... 26 TTABVUE

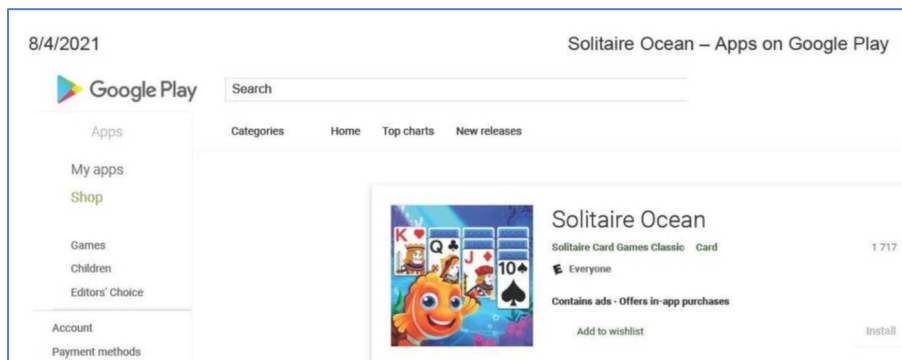
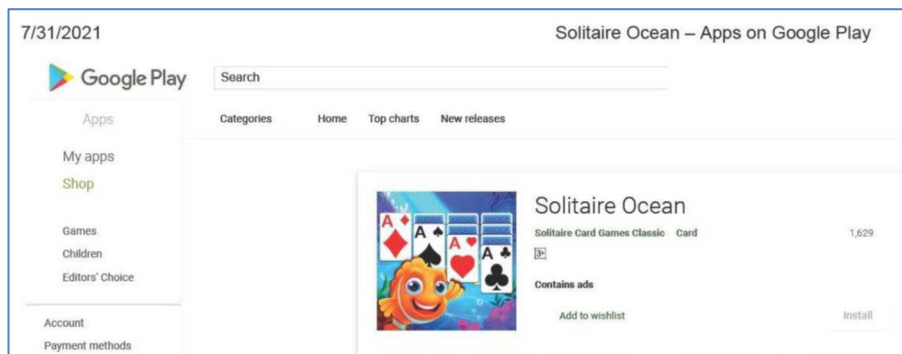
Applicant has objected to certain portions of Opposer’s testimony evidence and related exhibits. Applicant includes its Statement of Evidentiary Objections as Appendix A to this brief.

IV. STATEMENT OF FACTS

A. BACKGROUND ON APPLICANT AND APPLICANT’S MARK

Applicant Shanghai Zhenglang Technology Co. Ltd. (“Applicant”) designs, develops, and distributes mobile game applications (“apps”) and game software throughout the world. 22 TTABVUE 3-4 (R. Ji Decl. ¶¶ 3–5). Applicant offers and distributes apps to consumers in the United States through the Google Play and/or Apple App Stores. 22 TTABVUE 3 (R. Ji Decl. ¶¶ 5–6).

Applicant owns numerous trademark applications and registrations in the United States and throughout the world. Here, Applicant’s Marks are the “app icons” for Applicant’s app titled “Solitaire Ocean” on Google Play (“Applicant’s App”). 22 TTABVUE 3–5, 48, 94, 97, 132 (R. Ji Decl. ¶¶ 7-8, Ex. 1(A)-1(B)) (specimens of use submitted for Applicant’s Marks showing use of marks on Google Play). The “app icons” are shown alongside the app title, developer name, and other information in online search results and on the app listing page in Google Play:



Id. The AAAA Solitaire Ocean Mark is also used by Applicant as the “Profile Picture” on various social media pages for Applicant’s App, including Facebook and YouTube. 22 TTABVUE 5, 145-149 (R. Ji Decl. ¶ 9, Ex. 2).

On August 4 and 5, 2021, Applicant filed use-based applications, Ser. No. 90866064 (the “AAAA Solitaire Ocean Mark Application”) and Ser. No. 90868193 (the “KQJ10 Solitaire Ocean Mark Application”) (collectively the “Applications”), to register Applicant’s Marks in International Class 9 for (“Applicant’s Goods”):

Computer game programmes downloadable via the Internet; Computer game software downloadable from a global computer network; Downloadable computer application software for mobile phones, namely, software for use in database management, use in electronic storage of data, for playing online games; Downloadable computer game programmes; Downloadable computer game programs; Downloadable computer game software; Downloadable computer game software for personal computers and home video game consoles; Downloadable computer game software for use on mobile and cellular phones; Downloadable electronic game programs; Downloadable electronic game software; Downloadable electronic game software for handheld electronic devices; Downloadable electronic game software for use on mobile and cellular phones, handheld computers; Downloadable game software; Recorded computer game programs

See 22 TTABVUE 49–53, 87–97, 98–101, 135–149 (R. Ji Decl. ¶ 9, Ex. 1(A)-1(B)). (TSDR status, application, and specimen pages for the Applications).

The Examining Attorney did not refuse registration on any grounds, including mere descriptiveness under 15 U.S.C. § 1052(e). *See* 22 TTABVUE 49–51, 78–79, 98–100, 126–127 (R. Ji Decl. ¶ 9, Ex. 1(A)-1(B)) (TSDR status page for the Applications and their respective Office Actions). The USPTO published the Applications for opposition on June 28, 2022. *See* 22 TTABVUE 59, 108 (R. Ji Decl. ¶ 9, Ex. 1(A)-1(B)).

i. Features of Applicant’s App

Applicant’s App provides an extensive amount of continuously rotating multimedia content, including a wide variety of continuously rotating content, graphics, sounds, animations,

and user experiences—none of which are identical in appearance to or directly reproduced by Applicant’s Marks. 22 TTABVUE 18–19, 201-219 (R. Ji Decl. ¶¶ 18–20, Ex. 9).

ii. Features of Applicant’s Marks

Applicant’s Marks both consist of unique combinations of design elements and are used exclusively by Applicant. 22 TTABVUE 6-7 (R. Ji Decl. ¶ 12). Key features of Applicant’s Marks include:





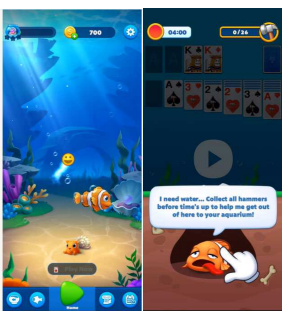
- A background, consisting of an underwater world with two rays of light streaming diagonally from upper left to right, and with sea plants, coral, and/or bubbles in all four corners of the design along the left and right edges;
- A central design superimposed in front of the ocean plant background, depicting ten playing cards. Four cards are face up and the rest are face down. A faint diamond pattern is on the backs of the cards. The playing cards in Applicant’s Design Marks are “single-ended” simplified and stylized versions of standard playing cards, with a letter or number in the upper left corner, a small version of the suit design in the upper right corner, and a large design of the suit or face card below.² The playing cards are arranged in four stacks, creating four columns, with the number of cards in each stack increasing by one from left to right. The first stack on the far left contains a single, face-up card. The second stack contains two cards, with the top card face-up and the card behind it face-down. The third stack contains three cards, with the top card face-up and the remaining two cards behind it face-down. The fourth stack on the far right contains four cards, with the top card face-up and the remaining three cards behind it face-down; and
- A cartoon fish resembling a clownfish in the foreground bottom left quadrant of the design, superimposed in front of the stacked cards and ocean plant background designs. The cartoon fish has two white stripes surrounded by black borders, and black borders on its dorsal (back) and pectoral (side) fins. The fish’s tail fins are down and partially cut off by the bottom edge of the design. The fins are rounded and scalloped. The cartoon fish’s eyes are large and rounded, with two ridges above them resembling eyebrows. The cartoon fish’s mouth is slightly open in a wide smile, revealing a white crescent of upper-row teeth and a tongue. The cartoon fish is facing outward and to the viewer’s right in three-quarters profile and appears to be looking at the viewer, smiling and waving its left (viewer’s right) fin.

Id. Applicant’s Marks are **not** screenshots from Applicant’s App, and **do not depict any actual screen** from Applicant’s App. 22 TTABVUE 18-19, 201–218 (R. Ji Decl. ¶¶ 18–20, Ex. 9)

² Standard playing cards typically have a “double-ended” design depicting mirror images of the card rank and suite in both the upper left and lower right corners of the card, so that the card is easily readable by players on both sides of a table.

(screenshots of Applicant's App submitted by Applicant). None of the gameplay screens or mechanics in Applicant's App are identical in appearance to Applicant's Marks. *Id.* Rather, the app features backgrounds with sand and water imagery and card games with 12 stacks of cards in multiple columns and rows, as shown below. *Id.*; see also 19 TTABVUE 4-5; 21 TTABVUE (Q. Li Decl. ¶ 9(d), Ex. 7) (screenshots of Applicant's App submitted by Opposer).

Fig. 2

Evidence Submitted by Applicant	Applicant's Marks	Evidence Submitted by Opposer
     <p style="text-align: center;">22 TTABVUE 211-218</p>	<p>AAAA Solitaire Ocean Mark</p>  <p>KQJ10 Solitaire Ocean Mark</p> 	 <p style="text-align: center;">28 TTABVUE 8 (Fig. 1)</p>  <p style="text-align: center;">19 TTABVUE 12</p>  <p style="text-align: center;">28 TTABVUE 14 (Fig. 3)</p>  <p style="text-align: center;">21 TTABVUE (Ex. 7)</p>

B. THE USE AND IMPORTANCE OF APP ICONS AS SOURCE IDENTIFIERS

As testified to by Applicant’s Chief Executive Officer Ruihua Ji—an industry veteran with over 10 years’ experience in the mobile game business, including overseeing the release of more than 30 games in the Google Play store—app icons are a very important part of a mobile app brand. *See* 22 TTABVUE 2–3, 19 (R. Ji Decl. ¶¶ 3, 21). When a user enters an app store such as Google Play or searches for a new mobile app, the app icon is one of the first things a user sees. *Id.* App marketplaces are very crowded, so app icons must be distinctive to “cut through the noise” and capture the attention of potential users. 22 TTABVUE 19–20 (R. Ji Decl. ¶ 22).

Mr. Ji’s sworn testimony, based on his personal observations and experience with mobile app marketplaces, is further supported and corroborated by publications and accounts from others in the mobile game and mobile app industry, which similarly report that app marketplaces are very crowded and that more distinctive app icons attract more users. For example:

- A third-party study in 2019 concluded that icon uniqueness was a strong predictor of an app’s success (defined as users’ willingness to click, download, and/or buy an app after viewing the icon), *see* 22 TTABVUE 19–20, 219–257 (R. Ji Decl. ¶ 22, Ex. 10);
- A third-party report in 2023 stated there were over 2.59 million apps in the Google Play Store as of June 2023, *see* 22 TTABVUE 8-9, 150–155 (R. Ji Decl. ¶ 15, Ex. 3); and
- A third-party report in 2023 found that only 2.1% of apps on Google Play have over 1 million downloads, and the majority of Google Play apps have been downloaded less than 1,000 times. *See* 22 TTABVUE 21, 258–271 (R. Ji Decl. ¶ 26, Ex. 11).

Applicant adopted Applicant’s Marks with the specific intention to distinguish Applicant’s App from other apps with similar functionality. 22 TTABVUE 20 (R. Ji Decl. ¶ 24). Applicant has promoted and advertised Applicant’s App under Applicant’s Marks through various advertising

channels including Google and YouTube. 22 TTABVUE 20–21 (R. Ji Decl. ¶ 25). The overwhelming success of this strategy confirms Applicant’s Marks clearly *are* distinctive enough to attract consumers. Indeed, with over one million global downloads as of June 2023, Applicant’s App has achieved a level of success and distinction shared by only a small fraction of other apps on Google Play. 22 TTABVUE 14, 20–21, 182–200 (R. Ji Decl. ¶¶ 15(d)(i), 25–27, Exs. 8, 11).

C. REGISTRABILITY AND DISTINCTIVENESS OF APP ICONS





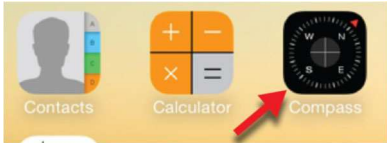

App icons are routinely registered as trademarks. Because of the importance of app icons to app brands, it is common for developers to seek trademark protection for their app icons. In recent years the USPTO has issued registrations for numerous mobile app icons. *See* 22 TTABVUE 22–46, 272–1216; 23 TTABVUE 1–669; 24 TTABVUE 1–530 (R. Ji Decl. ¶¶ 28-34, Exs. 12–55). Many of these app icons contain imagery suggesting features of an app, so that potential users can quickly determine whether an app is of interest. *Id.* Yet even where an app icon design conveys information about the genre or functionality of the underlying app, the USPTO has allowed such app icons to register without a disclaimer or claim of acquired distinctiveness. This is because these app icons do not *merely* convey information, but also distinguish one mobile app from another—the primary source-identifying purpose of trademarks.

The USPTO has registered the app icons of multiple brands that are household names—such as Google, Apple, and Instagram. Even where the app icon designs convey information about the genre or functionality of the underlying mobile application, these app icons did not receive a descriptiveness refusal, and were allowed to register, because such app icons do not *merely* convey information—they also distinguish one brand’s app with a certain function from another brand’s app with the same function. The app icons below, for example, each use an image or design element that is arguably informational—a telephone design for a phone app, a compass design for

a compass app, and a camera icon for a photography app—but would immediately be associated by many consumers with a particular source or brand. *See* 22 TTABVUE 22–24, 272–564 (R. Ji Decl. ¶¶ 28, Exs. 12–14).

Fig. 3

Third-Party Registrations for App Icons Relating to a Function or Feature of the Underlying App

App Icon (U.S. Reg. No. 6966949)	App Icon (U.S. Reg. No. 4516430)	App Icon (U.S. Reg. No. 4531884)
		
Excerpt of relevant goods/services:	Excerpt of relevant goods/services:	Excerpt of relevant goods/services:
Downloadable software for the transmission of voice, data, image, and audio...	Computer software for use as a digital compass	Downloadable computer software for modifying the appearance and enabling transmission of photographs...
Specimen of Use:	Specimen of Use:	Specimen of Use:
		
22 TTABVUE 22-23, 272–330 (R. Ji Decl. ¶¶ 28(a), Ex. 12)	22 TTABVUE 23, 331–414 (R. Ji Decl. ¶¶ 28(b), Ex. 13)	22 TTABVUE 24, 415–565 (R. Ji Decl. ¶¶ 28(c), Ex. 14)

This pattern and practice holds true in the context of mobile games. Indeed, Applicant has obtained U.S. trademark registrations on the Principal Register for the following marks in Class 9, for goods similar to Applicant’s Goods, all of which are app icons for Applicant’s games. None of these filings received descriptiveness objections. 22 TTABVUE 24–28 (R. Ji Decl. ¶¶ 29, 30–31, Exs. 15–21). Each of these marks serves as a source identifier by distinguishing Applicant’s games from the games of others, while also suggesting some aspect of the mobile games offered in connection with these marks such as a cat, jewel, block, or solitaire theme.



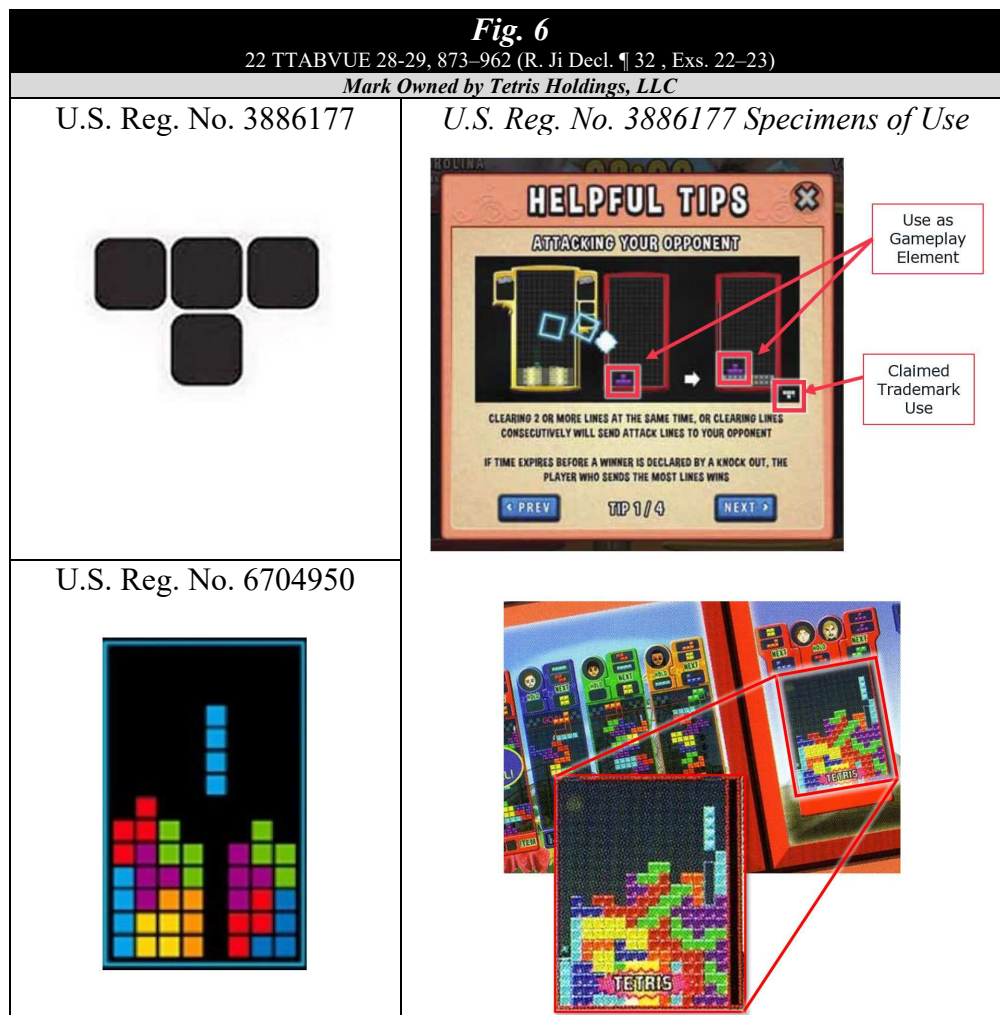
Notably, Applicant's U.S. Application Serial Nos. 97685495 and 97800061 feature cartoon animals and card design elements that are highly similar—and in some cases identical—to Applicant's Marks. These applications sailed through examination and publication without any office actions or third-party objections on descriptiveness or any other grounds, and were granted U.S. Registration No. 7026002 in April 2023 and US. Registration No. 7287168 in January 2024, respectively, *while these proceedings were ongoing*.



Many third-party app icons for mobile games are also registered on the U.S. Principal Register. Like Applicant's app icons, each of these third-party app icons include both distinctive source-identifying design elements and design elements suggesting some function, character, content, or theme of the underlying game.

For example, Tetris Holdings, LLC has obtained U.S. trademark registrations on the Principal Register under U.S. Reg. Nos. 3886177 and 6704950, for design marks depicting

elements of the classic “Tetris” game, include a Tetris game “piece” and a simplified, stylized Tetris game screen with colorful interlocking shapes made out of blocks similar. *See* 22 TTABVUE 28–29, 873–962 (R. Ji Decl. ¶ 32, Exs. 22–23). These marks are registered in Class 9 for computer game software and video games. *Id.* The specimens of use for these marks show these designs are used as source indicators, and also closely resemble in-game playable features and design elements. Yet these applications did not receive descriptiveness refusals. *See id.* at 873–962.



A representative sample of other third-party mobile game app icons, all of which are active and registered on the U.S. Principal Register, are below. For example, Figure 7 below depicts

registered design marks used as app icons for solitaire-style mobile games. Each of these design marks depicts playing cards or a series of playing cards—in some cases, unaccompanied by any other distinctive design elements. *See* 22 TTABVUE 30–37, 1180–1216; 23 TTABVUE 3–506, 583–633 (R. Ji Decl. ¶ 33, Exs. 30–35, 38–39). Applicant’s Marks contain as many distinguishing features, if not more, than these registered design marks.

Fig. 7
Third-Party Registrations for Solitaire Mobile Game App Icons Featuring Playing Cards

App Icon (U.S. Reg. No. 6463480)	App Icon (U.S. Reg. No. 6659212)	App Icon (U.S. Reg. No. 6659212)	App Icon (U.S. Reg. No. 6818227)
			
App Description & Preview:	App Description & Preview:	App Description & Preview:	App Description & Preview:
			
22 TTABVUE 30, 32-33, 1180–1216; 23 TTABVUE 3–7 (R. Ji Decl. ¶ 33(d)(i–ii), Exs. 30–31)	22 TTABVUE 34-35; 23 TTABVUE 8–43 (R. Ji Decl. ¶ 33(e)(i–ii), Exs. 32–33)	22 TTABVUE 34–35; 23 TTABVUE 44–506 (R. Ji Decl. ¶ 33(f)(i–ii), Exs. 34–35)	22 TTABVUE 36–37; 23 TTABVUE 583-633 (R. Ji Decl. ¶ 26(h)(ii), Ex. 38–39)

Examples of third-party mobile game app icons for other styles of mobile game, all of which are active and registered on the U.S. Principal Register, are depicted below. As with the solitaire-themed app icons above, each of the below app icons evokes certain features, themes, and/or components of the underlying mobile game, as demonstrated by the use evidence on record. For example, U.S. Reg. No. 5321091 depicts stylized bubbles and a cartoon witch, and the mark

is used as the app icon for a “bubble shooter” style mobile game featuring a witch character, titled “Bubble Witch 3 Saga.” See 22 TTABVUE 31, 1027–1104 (R. Ji Decl. ¶ 33, Exs. 26–27).




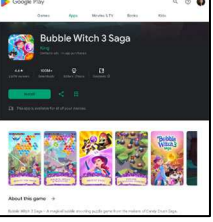




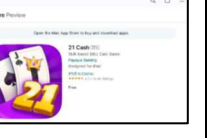







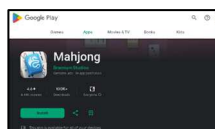

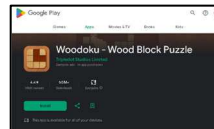
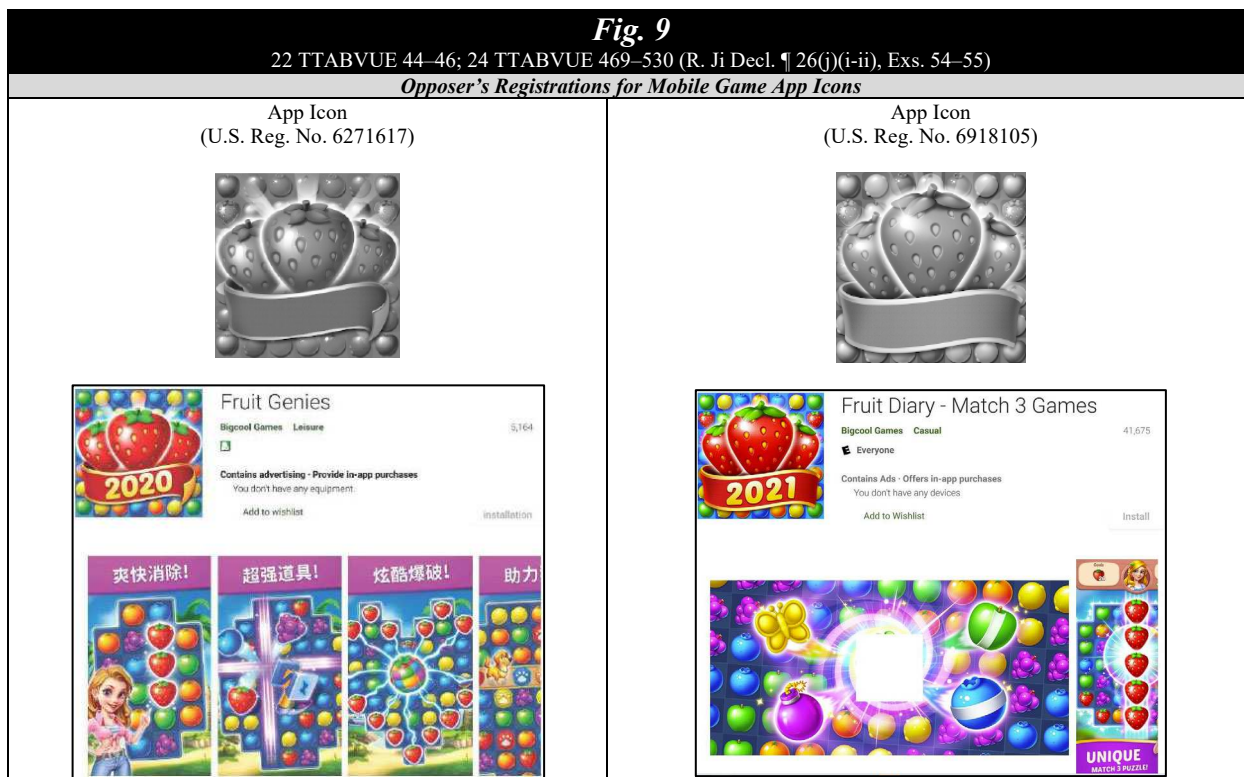
Fig. 8				
Third-Party Registrations for Mobile Game App Icons Featuring Gameplay Elements				
<p>App Icon (U.S. Reg. No. 5213574)</p>  <p>App Description & Preview:</p>  <p>The app listing indicates the app is a puzzle-style game involving connecting matching colors in hexagons. The app icon suggests this gameplay by showing connecting colors in hexagons.</p> <p>22 TTABVUE 30–31, 964–1026 (R. Ji Decl. ¶ 33(a)(i–ii), Exs. 24–25)</p>	<p>App Icon (U.S. Reg. No. 5321091)</p>  <p>App Description & Preview:</p>  <p>The app listing indicates the app is a “bubble shooter” style game featuring witch and cat characters. The app icon suggests this gameplay by showing bubbles, a witch, and a cat.</p> <p>22 TTABVUE 31, 1027–1104 (R. Ji Decl. ¶ 33(b)(i–ii), Exs. 26–27)</p>	<p>App Icon (U.S. Reg. No. 6887610)</p>  <p>App Description & Preview:</p>  <p>The app listing indicates the app is a “bubble shooter” style game in which users have “a chance to win real money.” The app icon suggests this gameplay by showing a bubble with a dollar sign “shooting” towards a group of bubbles.</p> <p>22 TTABVUE 32, 1105–1179 (R. Ji Decl. ¶ 33(c)(i–ii), Exs. 28–29)</p>	<p>App Icon (U.S. Reg. No. 6158826)</p>  <p>App Description & Preview:</p>  <p>The app listing indicates the app is a puzzle game involving building words out of letters. The app icon suggests this gameplay by showing letter tiles building the word “word.”</p> <p>22 TTABVUE 35–36; 23 TTABVUE 507–583 (R. Ji Decl. ¶ 33(g)(i–ii), Exs. 36–37)</p>	<p>App Icon (U.S. Reg. No. 6821167)</p>  <p>App Description & Preview:</p>  <p>The app listing indicates the app the popular “21” card game, combined with real cash prizes. The app icon suggests this gameplay by showing playing cards that add up to 21.</p> <p>22 TTABVUE 37–38; 23 TTABVUE 634–69; 24 TTABVUE 3–7 (R. Ji Decl. ¶ 33(i)(i–ii), Exs. 40–41)</p>

Fig. 8

<i>Third-Party Registrations for Mobile Game App Icons Featuring Gameplay Elements</i>				
<p>App Icon (U.S. Reg. No. 6659209)</p>  <p>App Description & Preview:</p>  <p>The app listing indicates the app is a casino-style game involving simulated slot machines. The app icon suggests this gameplay by showing a stylized slot machine and the word “slots.”</p> <p>22 TTABVUE 38–39; 24 TTABVUE 8–49 (R. Ji Decl. ¶ 26(j)(i–ii), Exs. 42–43)</p>	<p>App Icon (U.S. Reg. No. 6245833)</p>  <p>App Description & Preview:</p>  <p>The app listing indicates the app is a puzzle game involving building words out of letters. The app icon suggests this gameplay by showing letter tiles building the word “word.”</p> <p>22 TTABVUE 39–40; 24 TTABVUE 50–270 (R. Ji Decl. ¶ 26(k)(i–ii), Exs. 44–45)</p>	<p>App Icon (U.S. Reg. No. 6245833)</p>  <p>App Description & Preview:</p>  <p>The app listing indicates the app is a puzzle game involving building words out of letters. The app icon suggests this gameplay by showing letter tiles building the word “word.”</p> <p>22 TTABVUE 40–41; 24 TTABVUE 271–318 (R. Ji Decl. ¶ 26(l)(i–ii), Ex. 46–47)</p>	<p>App Icon (U.S. Reg. No. 6343464)</p>  <p>App Description & Preview:</p>  <p>The app listing indicates the app is a mahjong-style game involving connecting matching tiles. The app icon suggests this gameplay by showing various Mahjong-style tiles.</p> <p>22 TTABVUE 41–42; 24 TTABVUE 319–362 (R. Ji Decl. ¶ 26(m)(i–ii), Ex. 48–49)</p>	<p>App Icon (U.S. Reg. No. 6568797)</p>  <p>App Description & Preview:</p>  <p>The app listing indicates the app is a puzzle game involving wooden blocks. The app icon suggests this gameplay by showing two different shades of wooden blocks.</p> <p>22 TTABVUE 42–43; 24 TTABVUE 363–425 (R. Ji Decl. ¶ 26(n)(i–ii), Exs. 50–51)</p>

Even Opposer owns trademark registrations for app icon design marks that suggest features of the mobile game applications for which they are used. *See* 22 TTABVUE 44–46; 24 TTABVUE 469–530 (R. Ji Decl. ¶ 26(j)(i–ii), Exs. 54–55). For example, Opposer’s U.S. Reg. Nos. 6271617 and 6918105 both depict large fruit designs against a background of smaller fruit images in a grid pattern. The specimens submitted show these marks used as the apps icon for fruit-themed mobile games titled “Fruit Genies” and “Fruit Diary – Match 3 Games.” Both games are described as a “fruit match 3 game,” and the configurations of fruits shown in the app icon, including fruits in rows and columns with larger fruits floating in front, are common elements in the “match 3” game

genre and are nearly identical to the configuration of fruits depicted in the preview images showing the app gameplay.



Applicant's Marks are at least as distinctive as these registered design marks.

D. OPPOSER'S EVIDENCE

To support its position, Opposer relies on the following primary sources of evidence:

- Documentary evidence consisting of screenshots and a short video recording of Applicant's App, *see* 19 TTABVUE 4–5; 21 TTABVUE 2; (Q. Li Decl. ¶ 9(d), Ex. 7);
- Screenshots and videos from twelve third-party games, *see* 19 TTABVUE 5–11, 56–121; 21 TTABVUE 2 (Q. Li Decl. ¶ 11(a)-(l), Exs. 10–21, 22(A)-(L); and
- Testimony declarations from Opposer's Chief Executive Officer, Mr. Qianan Li. *See* 19 TTABVUE and 26 TTABVUE.

The bulk of this evidence is irrelevant and/or inadmissible, as explained further in

Appendix A (Evidentiary Objections), and should be given no consideration. Even if admissible, none of this evidence should be given much weight. *Ord. Sons of Italy in Am. v. Memphis Mafia Inc.*, 52 U.S.P.Q.2d 1364 (T.T.A.B. 1999) (giving reduced weight to self-serving testimony of witnesses who were all active members of petitioner’s organization, noting such testimony was less probative than testimony of a witness not associated with petitioner would have been); *Sprague Elec. Co., Inc. v. Elec. Utilities Co.*, 209 U.S.P.Q. (BNA) ¶ 88 (T.T.A.B. June 5, 1980) (finding self-serving opinions of witnesses who were “long-term employees” of opposer were “entitled to little or no probative value,” and noting that such testimony cannot substitute for proof such as marketplace surveys or other competent evidence showing purchaser conception). And even if the Board considers Opposer’s evidence purely at face value, as it is constrained to do,³ none of the evidence presented by Opposer establishes that Applicant’s Marks are merely descriptive, as discussed *infra* in Section V.B.

V. THE BOARD SHOULD DENY THE OPPOSITION AND GRANT REGISTRATION OF APPLICANT’S MARKS

A. LEGAL STANDARD

i. Opposer Has the Burden of Proof

Opposer has the burden to establish by a preponderance of evidence that Applicant’s Marks are merely descriptive of the goods for which they will be used. *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 1252 (Fed. Cir. 2012). Opposer has failed to meet this burden.

³ Nearly all of Opposer’s evidence consists of internet printouts, which are hearsay and cannot be used to prove the truth of the matter asserted. *See* Appendix A.

ii. Doubts Must Be Resolved in Favor of the Applicant

Opposer, through its brief, seeks to instill doubt about the inherent distinctiveness of Applicant's Marks and distract the Board with irrelevant facts and arguments. But the Board should ignore these distractions, and resolve any doubts as to descriptiveness in Applicant's favor. *In re Aid Lab 'ys, Inc.*, 221 U.S.P.Q. (BNA) ¶ 1215, 1216 (T.T.A.B. 1983) (“resolving any doubt in favor of the applicant” when assessing alleged descriptiveness); *In re Conductive Sys., Inc.*, 220 U.S.P.Q. (BNA) ¶ 84, 86 (T.T.A.B. 1983) (“[W]e have doubts about the ‘merely descriptive’ character of the mark before us and . . . it is clear that such doubts are to be resolved in favor of applicants.”); *In Re Moto Club Int'l, LLC*, 2024 WL 2303702, at *3 (T.T.A.B. 2024) (“The Board resolves doubts as to the mere descriptiveness of a mark in favor of the applicant.”); *In re TT Electronics Technology Ltd.*, 2009 WL 722045 (T.T.A.B. 2009) (same); *In Re Mj Cobalt, LLC*, 2024 WL 2316623, at *13 (T.T.A.B. 2024) (same).

iii. Marks Must Be Considered as a Whole —The Anti-Dissection Rule

When determining whether a mark is inherently distinctive, a mark must be considered as a whole, and the Board may not “dissect” the mark into isolated elements. *DuoProSS Meditech Corp.*, 695 F.3d at 1252. This “anti-dissection” rule recognizes that a composite mark may be more than the sum of its parts, even if those parts are descriptive. *See, e.g.*, 1 J. Thomas McCarthy, *McCarthy on Trademark and Unfair Competition*, Westlaw § 11:27 (5th ed., database updated Mar. 2024); *Application of Richardson Ink Co.*, 511 F.2d 559, 561 (C.C.P.A. 1975) (while “solid state” was descriptive of ink in solid form, composite RICO SOLID STATE was not merely descriptive). Notably, the word “merely” in “merely descriptive” carries significant weight, and “if a composite mark is not totally descriptive in all its parts, then the mark as a whole is not ‘merely’ descriptive.” McCarthy, *supra* § 11:51.

iv. The Test for Whether a Design Mark is Merely Descriptive

Whether a mark is merely descriptive is a question of fact, determined from the viewpoint of the relevant purchasing public. *In re Bed & Breakfast Registry*, 791 F.2d 157, 159 (Fed. Cir. 1986). The Board must focus on “the particular goods for which registration is sought.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1378 (Fed. Cir. 2012).

To determine whether a mark is merely descriptive, the Board primarily considers whether consumers would view the mark, as a whole, as merely an illustration or accurate pictorial representation of the relevant goods, without any additional fanciful, arbitrary, or suggestive matter. A mark need not be devoid of all meaning relative to the goods to be registered on the Principal Register. *See* TMEP § 1209.01(a). The Board may also consider other non-exclusive factors including the extent of third-party descriptive use; whether competitors are using or need to use a mark or design; and past treatment of similar third-party registrations.

All of these factors weigh in favor of finding that Applicant’s Marks are not merely descriptive, and are at the very least suggestive and thus entitled to registration.

B. OPPOSER HAS FAILED TO MEET ITS BURDEN OF PROVING THAT APPLICANT’S MARKS ARE MERELY DESCRIPTIVE

i. Opposer Has Not Established and Cannot Establish That Consumers Would View Applicant’s Marks as “Merely an Illustration” or “Accurate Pictorial Representation” of Applicant’s Goods

a. Applicant’s Marks Are Not a “Mere Illustration” or “Accurate Pictorial Representation” of Applicant’s App or Applicant’s Goods

In its brief, Opposer alleges that Applicant’s Marks are merely descriptive because they convey “knowledge of an ingredient, quality, characteristic, function, feature, purpose, or use” of “solitaire games.” *See* 28 TTABVue 15–16. In doing so, however, Opposer misstates the rule and conflates the descriptiveness test for *word marks* with the descriptiveness test for *design marks*.

In multiple instances, the Board has allowed a design mark to register, even where the design immediately conveyed some ingredient, characteristic, or feature of the underlying goods. *See* Sections V.B.i.b, *supra* and cases discussed therein. This is because the primary consideration for design marks such as Applicant’s Marks is not whether the design “immediately conveys” some aspect of the goods or services, as Opposer erroneously alleges, but rather whether the design “consists *merely of an illustration of the goods*, or of an article that is an important feature or characteristic of the goods or services.” *See* TMEP § 1209.03(f) (emphasis added) (citing cases). A design that consumers would perceive as an “*accurate pictorial representation*” of the goods is equivalent to a merely descriptive word and is equally ineligible for registration. TMEP § 1213.03(c) (emphasis added); *see also* TMEP §§ 1202.04, 1213.03(c), and cases discussed therein.

Opposer has not produced any evidence, much less a preponderance, demonstrating that Applicant’s Marks are merely descriptive under the appropriate standard. Critically, Opposer has offered no evidence regarding consumer perception of Applicant’s Marks, yet this is the only perception relevant to the inquiry. *See In re Bed & Breakfast Registry*, 791 F.2d at 159. Opposer performed no consumer surveys nor otherwise introduced expert testimony on consumer perception or the alleged descriptiveness of Applicant’s Marks.

Opposer’s screenshots and videos, in and of themselves, plainly cannot establish how consumers would perceive Applicant’s Marks. *See, e.g., In re Newbridge Cutlery Co.*, 776 F.3d 854, 863 (Fed. Cir. 2015) (internet information does not evidence the extent to which relevant consumers might discern the primary significance of a mark); *see also Freedom Federal Savings & Loan Ass’n v. Heritage Federal Savings & Loan Ass’n*, 210 U.S.P.Q. 227, 231 (T.T.A.B. 1981)

(third party use of marks without more is not probative of the impact that such marks have on consumer perception).

Nor does Opposer's evidence establish that either of Applicant's Marks, as a whole, is a *mere illustration* or *accurate pictorial representation* of Applicant's Goods. As explained by Applicant's CEO, Applicant's Marks are not an exact reproduction of any screen or game in Applicant's App, or any other puzzle game of which Applicant is aware. *See* Fig. 2, *supra*; 22 TTABVUE 17–18, 201–218 (R. Ji Decl. ¶¶ 18–20, Ex .9). *None* of Opposer's evidence shows that Applicant's Marks are depicted anywhere in Applicant's App, and the marks cannot be merely descriptive for that reason alone. *See* Fig. 2, *supra*.

b. Applicant's Marks Include Additional Stylistic, Arbitrary, and Fanciful Design Elements

The Board also recognizes that design marks are not merely descriptive, even where they convey an immediate idea of a feature of the goods, so long as they *also* are either sufficiently stylized, *see, e.g., Pelonis USA Ltd. v. Del-Rain Corp.*, No. 97864, 2001 WL 1182921, at *3 (T.T.A.B. Sep. 25, 2001) (stylized heater design); *Giltspur Expo Industries, Inc. v. Expo Communications, Inc.*, 227 U.S.P.Q. (BNA) ¶ 394 (T.T.A.B. 1985) (stylized modular display design); *In re Lrc Prod. Ltd.*, 223 U.S.P.Q. (BNA) ¶ 1250 (T.T.A.B. Sep. 28, 1984) (stylized gloves design); *In re Laitram Corp.*, 194 U.S.P.Q. (BNA) ¶ 206, 209 (T.T.A.B. 1977) (stylized conveyor belt design); *In re Curtiss-Wright Corp.*, 183 U.S.P.Q. (BNA) ¶ 621, 622 (T.T.A.B. Oct. 18, 1974) (stylized engine design); or contain arbitrary or fanciful design elements. *See, e.g., Home Juice Co. v. Runmlin Cos. Inc.*, 231 U.S.P.Q. (BNA) ¶ 897, 900 (T.T.A.B. 1986) (cartoon orange design); *Planters Nut & Chocolate Co. v. Crown Nut Co.*, 305 F.2d 916, 134 U.S.P.Q. 504 (C.C.P.A. 1962) (cartoon peanut design).

Opposer cites *In re Swatch Group Management Services AG*, 110 U.S.P.Q.2d 1751, 1757, 1762 (T.T.A.B. 2014), but in *Swatch* the Board explained that a merely descriptive design mark must “forthwith convey[] an immediate idea of a feature of the goods **and lack[] any additional fanciful, arbitrary, or suggestive matter.**” *Id.* (emphasis added). The second half of the *Swatch* test is critical. In *Swatch* and the other cases cited by Opposer, the marks at issue were deemed “legal equivalent[s]” of descriptive terms because they were “relatively accurate representations” of the relevant goods or services with no additional elements. *See Swatch Grp.*, 110 U.S.P.Q.2d at 1751, 1755 (mechanically accurate tourbillon design merely descriptive of jewelry and watches; *Pelonis USA Ltd. v. Del-Rain Corp.*, No. 97864, 2001 WL 1182921, at *3 (T.T.A.B. Sept. 25, 2001) (discussing cases).

Here, Applicant’s Marks are far from “legal equivalents” of the multifaceted mobile game offered by Applicant. Rather, these marks are simplified, stylized designs that evoke—but do not replicate—gameplay elements of Applicant’s App. The waving cartoon fish and four stacks of cards are simplified, stylized images suggesting the various aquatic characters and more complex 12-stack configuration of solitaire-style gameplay in Applicant’s App, just as the single “Tetris” piece and colorful interlocking blocks depicted in Tetris Holdings’ U.S. Reg. Nos. 3886177 and 6704950 are simplified, stylized designs suggesting the more complex “Tetris” gameplay shown in the specimens of use, as discussed in Section IV.C and shown in Fig. 6, *supra*.

The designs also add arbitrary and fanciful material in a distinctive composition to create an overall positive and welcoming impression, including the underwater scene with rays of light, sea plants, coral, and bubbles; the aesthetically pleasing arrangement of playing cards in four stacks in a winning suite; and the cartoon clownfish in the foreground smiling and waving invitingly. This additional arbitrary, fanciful, and suggestive material makes Applicant’s Marks

more than “merely” descriptive. Applicant’s Marks are not rendered unprotectable simply because they also contain elements relating to features or functions of Applicant’s Goods. *Cf. Two Pesos Inc. v. Taco Cabana Inc.*, 505 U.S. 763, 23 USPQ2d 1081 (1992); *In re DC Comics, Inc.*, 689 F.2d 1042 (C.C.P.A. 1982).

Because the record is devoid of any probative, admissible evidence—much less a preponderance of the evidence—that the relevant consuming public would view Applicant’s Marks as merely of an illustration of Applicant’s Goods, or an accurate pictorial representation of Applicant’s App or Applicant’s Goods, Opposer has not met its burden of proving that Applicant’s Marks are merely descriptive. In fact, Opposer *cannot* meet its burden, because Applicant’s Marks each reflect a simplified, stylized design that includes fanciful design elements not found in the actual game itself, and Applicant’s Marks are plainly not merely distinctive.

ii. Opposer Has Not Established and Cannot Establish That Competitors Are Using or Need to Use Applicant’s Marks, or That Third Parties Are Using Applicant’s Marks Descriptively

In addition to the above, Opposer has produced no evidence supporting any other factors that would favor a finding of descriptiveness. Opposer devotes a large portion of its brief to discussing purported third-party uses, arguing that Applicant’s Marks are “a common design” for mobile games. 28 TTABVUE 7–11, 14–17. A mark is less likely to be “merely descriptive” if competitors are not using, and do not need to use, the mark to advertise or describe similar offerings.

Here, Opposer has not produced any evidence that competitors are using or need to use Applicant’s Marks to describe goods or services similar to those offered by Applicant, and Applicant is not aware of any such uses. Opposer’s CEO alleges that Opposer and Applicant are competitors, but does not testify that competitors are using or need to use Applicant’s Marks to

fairly and accurately describe their own games, or that registration of Applicant's Marks would prevent descriptive fair use by others. *See* 19 TTABVUE 2–3 (Q. Li Decl. ¶¶ 2–3).

Nor has Opposer presented any evidence that third parties are using Applicant's Marks descriptively. Opposer claims Applicant's Marks are “are similar or almost identical to several third-party games featuring solitaires [sic]” 28 TTABVUE 16–18, yet none of Opposer's screenshots and videos depict third parties actually using *Applicant's Marks*.

Opposer improperly attempts to dissect Applicant's Marks and points to third-party uses of design elements similar to certain components of Applicant's Marks, but no image shows the same overall stylistic combination of elements as Applicant's Marks. *See* 22 TTABVUE 7–8 (R. Ji Decl. ¶ 12). Opposer cannot establish widespread third-party use of Applicant's Marks by submitting a mere twelve allegedly similar app icons out of the millions of app icons in the Google Play store, particularly when at least four of those twelve icons were only in use for a limited period of time before the app icon was changed or removed, or the entire app was disabled. *See* 22 TTABVUE 8–14 (R. Ji Decl. ¶ 15). To be relevant, a party submitting evidence of third-party use “must demonstrate that . . . third party use of the mark was ‘well promoted’ or that the mark was ‘recognized by consumers.’” *Tri-Star Pictures, Inc. v. Unger*, 14 F. Supp. 2d 339, 353 (S.D.N.Y. 1998) (quoting *Scarves by Vera, Inc. v. Todo Imps. Ltd.*, 544 F.2d 1167, 192 U.S.P.Q. 289 (2d Cir. 1976)). Where “the record includes no evidence about the extent of [third party] uses” the probative value of this evidence is “minimal.” *Han Beauty, Inc. v. Alberto-Culver Co.*, 236 F.3d 1333, 1338 (Fed. Cir. 2001).

Ultimately, the mere existence of third-party marks using discrete design elements similar to those in Applicant's Marks, allegedly used to advertise similar third-party goods, is entirely irrelevant as to whether consumers would perceive *Applicant's Marks* overall as a “mere

illustration” or “accurate pictorial representation” of *Applicant’s Goods*, and Opposer has offered nothing that actually supports its argument. *See, e.g., Tse, Saiget, Watanabe & McClure, Inc. v. Gentlecare Sys., Inc.*, 936 F.2d 580, at *3 (9th Cir. 1991) (rejecting defendant’s Yellow Page listings as evidence of third-party use because defendant failed to “submit evidence of how that third-party advertising or registration was actually used or perceived in the marketplace”).

Moreover, third-party *trademark use* of a word or design, as opposed to descriptive use, does not support a finding of mere descriptiveness. *See Ennis, Inc.*, Opp. No. 91203884, 2014 WL 5282257, at *11 (T.T.A.B. Sept. 30, 2014) (finding evidence of third party trademark use of the disputed terms “is not probative of consumer recognition of either term as possessing meaning which is generic, merely descriptive, or incapable of functioning as a trademark”); *see also Alcatraz Media, Inc. v. Watermark Cruises*, 107 U.S.P.Q.2d 1750, 1763, 1765 (T.T.A.B. 2013) (“mixed record of use of the phrase both generically and as part of what appear to be trademarks or trade names” failed to establish descriptiveness); *In re Am. Online, Inc.*, 77 U.S.P.Q.2d 1618, 1623 (T.T.A.B. 2006) (evidence of a “significant amount of proper trademark use” by third parties weighed against a finding term was generic).

If anything, Opposer’s purported evidence of third-party use of arguably similar app icons as source identifiers further supports a conclusion that consumers are accustomed to perceiving app icons as source identifiers, and will likewise perceive Applicant’s Marks as a source indicator. Indeed, the comparison table in Figure 5 of Opposer’s brief (28 TTABVUE 16–18), showcasing Applicant’s Marks alongside those of other third-party games featuring clownfish, reveals significant variations in download numbers, despite all being ocean-themed card games. This discrepancy underscores the critical role of a game's ability to distinguish itself among similar apps. The varying download figures (5m, 500k, 100k, 50k, 10k) highlight how consumer

recognition and differentiation between distinct icons contribute to a game's success. This evidence suggests that Applicant's Marks establish a strong brand identity in consumers' minds, transcending mere descriptiveness.

iii. The USPTO Has Deemed Similar Design Marks, Including Other Design Marks Owned by Applicant, Registrable on the Principal Register Without Issuing Merely Descriptiveness Objections or Requiring a Claim of Secondary Meaning

Lastly, as shown *supra* in Section IV.C, the USPTO has allowed other app icons to register on the Principal Register without a disclaimer or showing of secondary meaning, even where the app icons contain imagery suggesting features of the app with far less distinguishing elements than Applicant's Marks, including Opposer's own marks as shown below and in Figs. 7-9, *supra*:



Because there are already many registrations for mobile game app icons, Opposer's position goes against the great weight of practice and precedent. Opposer—perhaps revealing its business motive for bringing this opposition against a competitor—seemingly fails to recognize the inconsistency in arguing against registration of the marks at issue in this opposition while owning its own similar registrations for its own mobile games, and while failing to object to similar prior applications by Applicant or third parties for similar app icon marks. *Id.*

While Applicant recognizes that the Board is not bound by prior registration decisions of the USPTO, the post-hoc refusal to register particular categories of marks after previously registering numerous marks in the same category would create logistical issues, at least. *United States Patent & Trademark Office v. Booking.com B.V.*, 591 U.S. 549, 564 (2020) (rejecting the

Office's newly reversed registration rule because it "would . . . open the door to cancellation of scores of currently registered marks.").

Applicant respectfully submits that the USPTO's registration of these other app icon designs is instructive, and these registrations are persuasive evidence that app icons like Applicant's Marks are registrable. Applicant's Marks are similarly distinctive and entitled to registration on the Principal Register, and consumers are already accustomed to seeing similar marks in the marketplace and will perceive Applicant's Marks as a source indicator. In addition, a decision denying registration of Applicant's Marks on the basis that it is merely descriptive could open the door to numerous challenges against other similar registrations. This factor thus also weighs in favor of a finding that Applicant's Marks are not merely descriptive.

VI. CONCLUSION

In short, Opposer has not met its burden of proving by a preponderance of the evidence that Applicant's Marks are merely descriptive, because the evidence of record does not establish that consumers will view Applicant's Marks as a "mere illustration" or "accurate pictorial representation" of Applicant's Goods. To the contrary, the facts show Applicant's Marks are *not* merely descriptive, and are instead simplified, stylized designs with added fanciful elements, suggestive but by no means merely descriptive of Applicant's Goods. Additional factors weigh in favor of a finding that Applicant's Marks are not merely descriptive, including (i) the absence of evidence that competitors are using or need to use Applicant's Marks; (ii) the absence of evidence that third parties are using Applicant's Marks descriptively, or even at all, and (iii) past findings of registrability for similar marks. Applicant's Marks do not need to be devoid of all meaning relative to Applicant's Goods to be registrable, and should not be precluded from registration simply because they have some relation to Applicant's App and Applicant's Goods.

Any doubts as to whether Applicant's Marks are merely descriptive must be resolved in favor of Applicant—but there should be no doubt here.

For all the reasons explained herein, Applicant respectfully asks the Board to deny this opposition and grant registration of Ser. Nos. 90866064 and 90868193.

Dated: October 25, 2024

Respectfully submitted,

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APPENDIX A – EVIDENTIARY OBJECTIONS

Pursuant to 37 C.F.R. § 2.128(b), Applicant submits its objections to evidence submitted by Opposer. *See also Trademark Trial and Appeal Board Manual of Procedure* (“TBMP”) § 801.03. Applicant briefly summarizes these objections below and respectfully requests that the Board strike, or otherwise not consider or give any weight to, the following portions of Opposer’s brief, testimony, evidence and all references thereto:

Opposer’s Proffered Evidence	Objection(s)
<p>19 TTABVUE 5–11, 54–121; 21 TTABVUE (Q. Li Decl. ¶¶ 11–12, Exhibits 10–21, 22(A)–22(L))</p>	<p>Hearsay. FED. R. EVID. 802. This evidence consists of internet printouts purportedly showing third-party uses of app icons that are allegedly similar to Applicant’s Marks. These internet printouts can only be used for what they show on their face. To the extent that Opposer uses these to show the truth of the matter asserted (<i>e.g.</i>, the number of consumers who have downloaded the pictured apps, consumer perception of the app icons, or the extent of use that would indicate whether consumers would be aware of such use) they are inadmissible hearsay.</p> <p>Irrelevance. FED. R. EVID. 402. The relevance of third-party use depends directly on the context and impact of such use. <i>See Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772</i>, 396 F.3d 1369, 1373 (Fed. Cir. 2005). Absent evidence that any of the third-party uses purportedly shown in these exhibits was well promoted or recognized by consumers, this evidence is not relevant to determining whether Applicant’s Marks are merely descriptive.</p> <p>Lack of Foundation. FED. R. EVID. 602, 901. These internet printouts were submitted via a Notice of Reliance. No testimony was offered to authenticate these documents, and thus these documents lack the necessary foundation to be admissible.</p>
<p>19 TTABVUE 3–4, 20–24; Q. Li Decl. ¶¶ 7–8, Exhibits 2–3)</p>	<p>Hearsay. FED. R. EVID. 802. This evidence consists of internet printouts purportedly showing categories of apps and games on Google Play. These internet printouts can only be used for what they show on their face. To the extent that Opposer uses these to show the truth of the</p>

Opposer's Proffered Evidence	Objection(s)
	<p>matter asserted (<i>e.g.</i>, that the listed categories are actually recognized categories) they are inadmissible hearsay.</p> <p>Irrelevance. FED. R. EVID. 402. The purported categories or “tags” for games such as “Action, adventure, arcade, board, card, casino, casual, educational, music, puzzle, racing, role playing, simulation, sports, strategy, trivia, word” are not relevant to determining whether Applicant’s Mark—a design mark—is merely descriptive.</p> <p>Lack of Foundation. FED. R. EVID. 602, 901. This internet printout was submitted via a Notice of Reliance. No testimony was offered to authenticate these documents, and thus this document lacks the necessary foundation to be admissible.</p>

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

HANGZHOU MENGKU TECHNOLOGY
CO., LTD

Opposer,

v.

SHANGHAI ZHENGLANG
TECHNOLOGY CO., LTD.,

Applicant.

Opposition No. 91281389 (Parent)

Opposition No. 91281390

Application Ser. Nos. 90866064, 90868193

Ser. No. 90866064 Ser. No. 90868193



CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing APPLICANT SHANGHAI ZHENGLANG TECHNOLOGY CO., LTD.'S TRIAL BRIEF is being filed electronically with the TTAB and served to Opposer's counsel by electronic mail at:

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Dated: October 25, 2024

/Kris Teilhaber/
Kris Teilhaber
Kilpatrick Townsend & Stockton LLP